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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-998

TOM PARKER and MORRIE PARKER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioners' Brief in Reply to Respondent's Brief in Opposition.

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Introductory Statement.

This Brief is being submitted in behalf of Petitioners Tom Parker and Morrie Parker in response to Respondents' Brief in Opposition in the within case and will deal only with those issues raised in said opposition.

Statement of Facts.

Petitioner does not dispute the statement of facts contained in Respondents' Brief except to note that the lengthy recitation of the nature and quantity of sexual activity contained in the films presented to the jury

below is clearly irrelevant to the issue presented by the instant petition.[1] That issue, simply stated, is whether a state may prohibit all of its citizens from engaging in acts of oral-genital sex.

Furthermore, counsel wishes to make it absolutely clear that the attorney referred to on page 5 of Respondents' Brief was Petitioners' former civil attorney, and not present counsel for Petitioner.

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[1]As noted in our Petition for Writ of Certiorari, the jury found that all of the films which were the subject of the proposed sale were legally protected expression under the *Roth-Memoirs* test. It would appear, however, that Respondents' recitation of the sexual content of the films is intended simply as a device to divert this Court's attention from the plain language and meaning of Penal Code Section 288a, in the hope that the Court will fail to scrutinize the statutory proscription and react only to the obviously controversial content of the films.

ARGUMENT.

I

Petitioners Have Standing to Attack the Constitutionality of Penal Code Section 2882 on Its Face.

Respondent argues that Petitioners do not have standing to attack Penal Code Section 288a on its face for the reason that they cannot assert the rights of those married couples or consenting single adults in California who may wish to engage in oral-genital sex. In this regard, Respondent argues that "the interests of married persons, which Petitioners seek to raise in their argument on the merits, will not be adversely affected by this litigation and there is no special relationship between petitioners and those third parties." (Resp. Br. p. 7.)

Contrary to Respondents' assertion above-quoted, there can be no doubt but that the interests of married persons and consenting single adults will be, and are, adversely affected by this litigation, given the existence of Penal Code Section 288a which on its face makes it a felony punishable by up to 15 years in prison for *any* of such persons to engage in oral-genital sex. Likewise, the expert testimony developed during the pre-trial motion to dismiss, indicated that certain classes of people who suffer from spinal cord injuries are unable to engage in any kind of sex other than oral-genital sex. Thus, the continued existence of Penal Code Section 288a creates a situation whereby any physician or therapist in a veteran's administration hospital in California who advises a paraplegic of oral-genital sexual techniques, is in danger of conspiring to violate Section 288a. That such information and education is deemed necessary is clear in light of the pre-trial evi-

dentiary hearing, wherein a motion picture film, Petitioners' Exhibit "J", was introduced into evidence, which said film depicts paraplegic males discussing their sexual and psychological adjustment problems with their wives, and concludes with footage depicting a paraplegic male engaging in oral-genital sex with his able-bodied wife.

Lastly, this Court has consistently held that when a statute seeks to regulate conduct as vital as an adult citizen's right to choice of sex act, the statute must stand or fall on its face. Thus, this Court held in *Coates v. Cincinnati,* 402 U.S. 613, 91 S.Ct. 1686 (1971), that:

> "The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. *The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.*" *Coates v. Cincinnati, supra,* 616. (Emphasis added).

II

California Penal Code Section 288a Is Facially Unconstitutional.

Respondent argues that California's flat proscription against oral-genital sex for all citizens is constitutional without ever articulating any reason or rational basis for this contention. Instead, Respondent seeks to take

refuge in the fact that the statute is allegedly constitutional because it was used, in this instance, to prosecute a producer of "sexploitation films". However, Respondent neglects to note that the jury found that the films at bar were not obscene, despite the acts of oral copulation contained in each film. [A letter from the jury forewoman to the trial judge, explaining the jury verdict, is attached hereto as Appendix "A".]

Petitioner agrees that California could pass a statute prohibiting the filming of acts of oral copulation in light of *Miller v. California*, 413 U.S. 15 (1973). However, to date, California has not done so and the statute at issue, which was first enacted in 1921, was never intended to apply to motion picture films or film makers, but instead was and is intended to apply to all citizens. Thus, in *People v. Ragsdale*, 177 Cal.App. 2d 676, 677, 2 Cal.Rptr. 640 (1960), the California Court of Appeal noted that:

> "[T]he making of *unnatural sexual relations* a crime is embedded in the history of the common law and finds its sanctions in the broader basis of the settled mores of our western civilization." (Emphasis added.)

Respondent nowhere indicates in its Brief in Opposition that Penal Code Section 288a has been limited in any way so as to exclude application to married couples or single adults. It follows that "if the law is found deficient in one of these respects [vagueness or overbreadth], it may not be applied to him either, until and unless a *satisfactory limiting construction is placed on the statute*. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in

unnarrowed form would tend to suppress constitutionally protected rights." *Coates v. Cincinnati, supra,* 619-620. (Emphasis added.)

Finally, in arguing that Penal Code Section 288a is constitutional, Respondent not only overlooks the unimpeached record of the various experts called by Petitioner, who testified in substance that there is no rational basis for the statute at bar, they also overlook the testimony of the only two experts called at trial by the People, both of whom testified that there is nothing unnatural or abnormal about oral-genital sex among adults. [See Reporter's Transcript of trial testimony of Dr. Martin Reisen, p. 408, and Dr. Roy Madsen, p. 1021.]

Conclusion.

Petitioners were convicted, in the only case tried to a jury, of producing and directing a scene in a motion picture which said film was found by a jury to be constitutionally protected expression. Six defense experts and two prosecution experts all unanimously concluded that oral-genital sex is a normal sexual expression. The statute has never been narrowed or limited by California's highest court and its legislative history demonstrates that it was, and is, meant to apply to all citizens. Unquestionably, there is no rational basis justifying the continued existence of Penal Code Section 288a.

For the foregoing reasons, it is respectfully requested that the petition for Writ of Certiorari be granted.

Dated: This 18th day of March, 1974.

Respectfully submitted,

ANTHONY MICHAEL GLASSMAN,
Attorney for Petitioners.

APPENDIX "A."

May 25, 1972

Honorable David Eagleson
Dept. 44—Superior Court
111 N. Hill St.
Los Angeles, Calif. 90012

Re: Tom & Morrie Parker

Dear Judge Eagleson:

I had intended writing you at the conclusion of the Parker trial, but time and the daily exigencies have a subtle but sure way of thwarting our intentions. I wanted to express my appreciation for the privilege of sitting in your courtroom. It provided a great learning experience for me, and the benefits were all mine.

I admired your deft manuevering of the myriad procedural technicalities, and was particularly impressed with the logic of your remarks.

I am even more impelled to write you now, in anticipation of the impending sentencing of Tom and Morrie Parker, upon their release from the Chino facility. My motivation is basically that of a concerned citizen, stemming from my close involvement with the case. We were instructed not to consider the punishment aspect in the course of our deliberations, and we did not. I feel, however, that by bringing some facts to your attention at this time, you might be presented with some valid additional guidelines for subsequent review, prior to sentencing. The ultimate objective is that they have a bearing in your study and create a climate of thought favorable towards granting probation to the Parkers.

The verdicts, of course, are eloquent in themselves. I merely feel it would not be remiss to underscore them at this point in time.

We followed your instructions to the letter and felt they virtually decreed the decisions. We acquitted on Counts 1 and 2 because there was significant room for acquittal. On Counts 4 and 5, conviction was called for by the existence of Sect. 288-A. In this regard, we considered the law archaic, its validity questionable, and suspect, in itself. The overall opinion was that it should be repealed. Summarily, the verdicts were not popular ones, but we felt they were just.

Count 1 revealed an indicative thought barometer. On the initial balloting, our vote was 6 to 6. What followed were many long and loud hours, identifying and probing the issues, and applying the three prescribed criteria for determining obscene material. We could not find the films prurient within the framework of the pruriency definition as furnished by the court. As to "limits of social candor", with supportive testimony mainly in the form of surveys, we encountered doubt and skepticism regarding their manipulative structuring, possible built-in loopholes and apparent vulnerability, and had to profess to a diminution of their value and credence. With respect to "social redeeming importance", we acceded there could be an inherent entertainment or educational factor involved, however marginal. The synthesis of our evaluation dictated the films entitlement to protection. This relays only a capsule version of our appraisal of Count 1, but documents essentially the foundation for our decision.

While beholding their cause as something less than noble, we nevertheless had to acknowledge the legitimate rights of the defendants as businessmen engaged

in a profitable pursuit—selling a particular commodity to a particular segment of our society. We could prove no crime and could find no victim. The general feeling among us was that cases of this nature should not continue to consume the considerable time and talents of the courts, nor to dissipate the taxpayers' money.

We were an objective, thorough and diligent panel, charged with an awesome responsibility. We felt we fulfilled that responsibility with integrity and merit.

I earnestly solicit your thoughtful consideration of my comments.

Respectfully,

/s/ Molly Ackerman
Molly Ackerman